Supreme Court, U.S.
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In The Supreme Court of the United States

FRED BECK, *ET AL.*,

Petitioners,

vs.

KOPPERS INC. F/K/A KOPPERS INDUSTRIES, INC., *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Court of Appeals for the Fifth Circuit free to issue a writ of mandamus, reversing a decision of the District Court for the Northern District of Mississippi, with no explanation for the basis for the panel's decision – when this Court has expressly ruled, in terms that cannot be misunderstood – that such an explanation *must be* forthcoming?

2. If not, will this Court grant this petition and reverse that ruling by that court of appeals, or, alternatively, will this Court disregard the court of appeals' failure to follow this Court's clear mandate, refuse to grant this petition and thereby sanction that ruling, though it is directly contrary to clear decisions of this Court?

3. Do decisions of this Court permit the Court of Appeals for the Fifth Circuit to issue a writ of mandamus, to reverse a district court's discretionary decision, which involved *no* "extraordinary" ruling, no "exceptional" decision and no "drastic" action by the district court when this Court has consistently ruled that writs of mandamus must only be issued to address limited circumstances not involved in this case?

4. If not, will this Court permit this writ of mandamus to remain in full force and effect, thereby compelling the district court to conduct jury trials at the location preferred by one party and, apparently, one panel of the court of appeals?

QUESTIONS PRESENTED – Continued

5. Do decisions of this Court authorize the court of appeals to issue a writ of mandamus, to reverse a district court's decision, that involves no inappropriate exercise of jurisdiction by the district court – when this Court, in case after case, had admonished lower courts that writs of mandamus are only to be issued, under limited and extraordinary circumstances, usually to address clear abuses of a lower court's jurisdiction?

6. If not, will this Court grant this petition and vacate this writ or will this Court allow this writ to be enforced as against the district court?

7. Will this Court refuse to grant this petition and thereby sanction the issuance of this writ by the Court of Appeals for the Fifth Circuit to substitute for an appeal of the district court's venue decision – despite rulings by this Court that mandamus is no substitute for appeal?

LIST OF PARTIES

Additional parties are:

Kay Hobbs
Walter Hobbs
David Hill
Alice Hill
Carlus Loggins
Debbie Loggins
Makia Carver
Michael Topps
Glenda Faye Mitchell
Derion Griffin
Jennifer Griffin
Nykiya George
Nicholas Hill
Jarvis McNeal
Talicia McNeal
Leroy McNeal
Willie McNeal
Patricia McNeal
Loretta McNeal
L.C. McNeal

Petitioners,

Koppers Inc. f/k/a Koppers Industries, Inc.
Beazer East, Inc.
Illinois Central Railroad Company, Inc.

Respondents.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit, dated April 3, 2009 is unreported and reprinted at Appendix ("App.") A. (A written decision was not submitted/rendered with the court's April 3, 2009 order.) The order denying Koppers' first petition for writ of mandamus of the first panel of the court of appeals to hear the petition, dated March 16, 2007, is unreported and reprinted at App. B. The decisions of the district court granting Petitioners' *ore tenus* motion, and denying Koppers' motion for reconsideration is reprinted at App. C-E.

JURISDICTION

The court of appeals granted the petition for writ of mandamus on April 3, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1404(a) provides:

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

28 U.S.C. § 104 provides:

For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Mississippi is divided into two judicial districts to be known as the northern and southern districts of Mississippi.

NORTHERN DISTRICT (a) The northern district comprises four divisions. (1) Eastern division comprises the counties of Alcorn, Attala, Chickasaw, Choctaw, Clay, Itawamba, Lee, Lowndes, Monroe, Oktibbeha, Prentiss, Tishomingo, and Winston.

Court for the eastern division shall be held at Aberdeen, Ackerman, and Corinth. (2) The western division comprises the counties of Benton, Calhoun, Grenada, Lafayette, Marshall, Montgomery, Pontotoc, Tippah, Union, Webster, and Yalobusha.

Court for the western division shall be held at Oxford. (3) The Delta division comprises the counties of Bolivar, Coahoma, De Soto,

Panola, Quitman, Tallahatchie, Tate, and Tunica.

Court for the Delta division shall be held at Clarksdale. (4) The Greenville division comprises the counties of Carroll, Humphreys, Leflore, Sunflower, and Washington.

Court for the Greenville division shall be held at Greenville.

SOUTHERN DISTRICT (b) The southern district comprises five divisions. (1) The Jackson division comprises the counties of Amite, Copiah, Franklin, Hinds, Holmes, Leake, Lincoln, Madison, Pike, Rankin, Scott, Simpson, and Smith. Court for the Jackson division shall be held at Jackson. (2) The eastern division comprises the counties of Clarke, Jasper, Kemper, Lauderdale, Neshoba, Newton, Noxubee, and Wayne.

Court for the eastern division shall be held at Meridian. (3) The western division comprises the counties of Adams, Claiborne, Issaquena, Jefferson, Sharkey, Warren, Wilkinson, and Yazoo.

Court for the western division shall be held at Natchez and Vicksburg. (4) The southern division comprises the counties of George, Hancock, Harrison, Jackson, Pearl River, and Stone.

Court for the southern division shall be held at Biloxi and Gulfport. (5) The Hattiesburg division comprises the counties of Covington, Forrest, Greene, Jefferson Davis, Jones,

Lamar, Lawrence, Marion, Perry, and Walthall.

Court for the Hattiesburg division shall be held at Hattiesburg.

STATEMENT OF THE CASE

Petitioners allege personal injury and property damages from various exposures to chemicals associated with Koppers' operation of the Grenada County wood treating facility.

In March, 2003, 110 residents of Grenada, Mississippi, sued Koppers, Inc., *et al.,* in the Western Division (at Oxford, Mississippi) of the Northern District of Mississippi. The case was later severed into individual actions. On March 15, 2005, the district court assigned to these cases (Judge Allen Pepper) entered an Order sustaining Koppers, *et al.*'s Motion to conduct trials of these lawsuits in Oxford, Mississippi. Thereafter, separate trials, on twelve of the 110 Petitioners' lawsuits, were scheduled to occur in Oxford, Mississippi on alternative months. On April 17, 2006, the first of these twelve cases, *Sherri Barnes v. Koppers, Inc., et al.,* was tried at Oxford, Mississippi for three weeks. On May 5, 2006, the jury returned a verdict in favor of Sherri Barnes. On May 17, 2006, District Judge Pepper entered an order granting Petitioners' *ore tenus* motion seeking the scheduling of the remaining trials against Koppers at

Judge Pepper's duty station in Greenville, Mississippi.

Koppers promptly filed a motion asking the district court to reconsider the court's May 17, 2006, Order. On July 25, 2006, the district court denied Koppers' Motion for Reconsideration. On July 26, 2006, Koppers filed its Notice of Appeal of the jury verdict entered in favor of Sherri Barnes.

On February 13, 2007, Koppers filed an Application for writ of mandamus to the Fifth Circuit Court of Appeals seeking the following relief:

> "Petitioners Koppers, Inc., and Beazer East, Inc., respectfully request that the court issue a writ of mandamus directing the district court to vacate its May 17, 2006, and July 25, 2006, Orders transferring all future trials in this litigation from the Western Division to the Greenville Division and reset all future trials in this litigation in the Western Division."[1]

In its first writ of mandamus, Koppers asserts that its writ is "clearly justified" because:

> 1. "The transfer of all future trials and the application of the informal local practice articulated and relied on by the district court

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[1] Koppers' writ of mandamus, page 15.

> is inconsistent with the plain and unambiguous test of 28 U.S.C. § 1014 and 1404."[2]
>
> 2. "The district court erred in its interpretation and application of the 'interest of justice' language of 28 U.S.C. § 1404."[3]
>
> 3. "Respondents lack standing to seek transfer pursuant to 28 U.S.C. § 1404."[4]

On February 14, 2007, Koppers filed its appellate brief in *Barnes*. One multi-page section in Koppers' Brief is introduced with the following caption:

> "To the extent this case is remanded for a new trial, the district court *does not* have authority to transfer this action from the Western Division to the Greenville Division pursuant to an unwritten and unpublished practice of the Northern District of Mississippi."[5]

The relief sought and the arguments made regarding the location of future trials by Koppers via its Application for writ of mandamus as well as Koppers' Brief in *Barnes* was identical.

On March 16, 2007, a panel of the Fifth Circuit Court of Appeals (Judges King, Higginbotham and

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[2] Koppers' writ of mandamus, page 21.

[3] Koppers' writ of mandamus, page 21.

[4] Koppers' writ of mandamus, page 26.

[5] *Barnes v. Koppers Inc.*, 534 F.3d 357 (2008).

Garza), denied Koppers' application for writ of mandamus (and by such denial, such panel refused to direct Judge Pepper to conduct future trials against Koppers in Oxford, Mississippi).[6]

On November 6, 2008, a separate/different panel of the Fifth Circuit Court (Judges Jones, Garwood and Jolly), ruled that Sherri Barnes' claim was barred by a Mississippi Statute of Limitation. *Barnes v. Koppers Inc.*, 534 F.3d 357 (5th Cir. 2008). But that panel did not order Judge Pepper to try subsequent cases against Koppers in Greenville, nor did it determine that Judge Pepper's May 17, 2006, and July 25, 2006, Orders were contrary to law or constituted any abuse of discretion.

Following this Court's reversal of the *Barnes* jury verdict, Judge Pepper conducted a November 25, 2008, Status Conference at which the further handling of the eleven lawsuits that remained to be tried against Koppers was discussed. Despite the fact that the Fifth Circuit Court of Appeals had not granted Koppers' prior requests to order Judge Pepper to conduct future trials in this action in Oxford, Koppers continued to complain about Judge Peppers' decision. Perhaps weary of Koppers' unrelenting efforts to secure trials at a location where Koppers *believed it had a tactical advantage*, the district judge invited Koppers to file *yet another* motion asking him

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[6] See Appendix B.

to order that trials of the upcoming eleven lawsuits against Koppers take place in Oxford, Mississippi.

Following this November 25, 2008, Status Conference, Koppers filed a *third Motion* seeking such a ruling from Judge Pepper. On January 29, 2009, Judge Pepper once again denied Koppers' Motion, but he granted Koppers' request for interlocutory certification. In doing so Koppers was allowed to once again ask the Fifth Circuit Court of Appeals to decide whether, *as a matter of law*, it was mandatory that cases filed in Oxford be tried in Oxford – or whether Judge Pepper had the *discretion* to conduct trials of cases filed in Oxford in Greenville, and if so, whether Judge Pepper "abused" that discretion in deciding to try these cases in Greenville.

On February 20, 2009, Koppers filed a *second* and nearly identical application to the Fifth Circuit Court of Appeals asking it to issue a writ of mandamus, despite the fact that another panel of the court had previously refused to issue such an extraordinary writ.

In its Second Petition for writ of mandamus, Koppers asserts the issuance of its writ is "clear and undisputable,"[7] because:

> 1. "The district court lacks the authority to transfer the location of all future trials to another division, over the objection of

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[7] Koppers' second writ of mandamus, page 9.

Petitioners, without transferring the venue of the entire action."[8]

2. "The district court clearly abused its discretion by misapplying the law to the facts under *Volkswagen* and reached a patently erroneous legal conclusion under 1404(a)."[9]

3. "Convenience of parties and interest of justice weigh heavily in favor of trial in the Western Division."[10]

4. "The district court ignored the significant local interest of trying these cases in the Western Division."[11]

5. "The district court clearly abused its discretion."[12]

The second panel of that court – unlike the first panel of the court – granted Koppers' second redundant, Application for writ of mandamus thereby compelling Judge Pepper to conduct the next trial of the second plaintiff in this case at the Division location of Koppers' choice, Oxford, Mississippi.

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[8] Koppers' second writ of mandamus, page 9.

[9] Koppers' second writ of mandamus, page 11.

[10] Koppers' second writ of mandamus, page 14.

[11] Koppers' second writ of mandamus, page 15.

[12] Koppers' second writ of mandamus, page 15.

REASONS FOR GRANTING THE PETITION

Petitioners are keenly aware of the realities that face them, as this Court considers whether the issues presented by this petition are of sufficient *importance* to warrant this Court's consideration.

Petitions for Writs of Certiorari – Petitioners acknowledge – are rarely granted. Perhaps that fact explains why a Court of Appeals for the Fifth Circuit panel saw fit to grant the writ of mandamus to be hereafter discussed. Such panel apparently believed that it was free to disregard rulings of this Court, because if such a decision was challenged, this Court would likely not address such a ruling – because, as stated, petitions seeking writs of certiorari to this Court are rarely granted.

That ruling, that panel's grant of this writ of mandamus in this case presents this Court with this issue, via this petition: Is any three judge panel, of any court of appeals in America, free to grant a writ of mandamus – *with no explanation*, and thereby overrule a purely discretionary decision by a district judge, in a case involving no "extraordinary" or "exceptional" or "drastic" circumstance?

If courts of appeals in America are free to issue writs of mandamus, to reverse district court decisions that are neither "extraordinary"[13] nor

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[13] " . . . the writ [of mandamus] will issue only in *extraordinary circumstances*. . . ." *Kerr v. United States*, 426 U.S. 394, 96 S.Ct. 2119, 48 L. Ed. 2d 725 (1976).

"exceptional"[14] or "drastic"[15] – *with no explanation,* then this Court should deny this petition.

This Court has directed lower courts, in terms that simply cannot be misunderstood, that before a writ of mandamus can issue such courts *must* "give a reasoned explanation for the basis for its action" because of the "extremely awkward positions" that grants of writs of mandamus impose upon district judges. *Will v. United States*, 389 U.S. 90 (1967). No explanation accompanied this panel's grant of this writ – the "awkward position" that this ruling conferred upon District Judge Pepper was of no concern to this panel.

Are courts of appeals free to disregard that clear directive? If courts of appeals are free to issue writs of mandamus, with no explanation, then the directive of this Court becomes mere "lip service." Can it be that this Court's express directive, to lower courts, which this panel saw fit to disregard, means nothing? If so, this Court should deny this petition.

This Court has also directed lower courts to *only* issue writs of mandamus "where appeal is a *clearly*

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[14] " . . . only *exceptional* circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90 (1967).

[15] "Mandamus, prohibition and injunction against judges are *drastic* and extraordinary remedies." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953).

inadequate remedy,"[16] further observing that "the extraordinary writs cannot be used as substitutes for appeals."[17] There is no reason to suspect that, since Respondent disagrees with Judge Pepper's decision, Respondent would experience *any difficulty* whatsoever in seeking appellant review to address Respondent's disagreement. Indeed, Respondent has fared quite well in the court of appeals, in addition to securing this favorable venue decision from that court,[18] this panel granted mandamus thereby eliminating any need for Respondent to appeal. If lower courts are free to substitute writs of mandamus for appeals – as here occurred – and this Court sees no reason to address such a practice – then this petition should be denied.

As mandated by statute,[19] jury trials in the Northern District of Mississippi are conducted at three locations: at Oxford, Mississippi, at Aberdeen, Mississippi, and at Greenville, Mississippi.

District Judge Allen Pepper sustained Respondents' (Koppers) motion and severed, for trial purposes, the separate claims of twelve separate Petitioners, each of whom claimed that deliberate,

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[16] *Id.* at 112.

[17] *Id.* at 113.

[18] In the first of twelve trials between these parties, the court of appeals vacated a jury verdict in plaintiff's favor and rendered judgment in Koppers' favor.

[19] See 28 U.S.C. § 104. Trials no longer take place at the Clarksdale Division.

reoccurring, emissions of carcinogenic chemicals from Respondent's wood treatment plant, was negligent, constituted trespass, were a nuisance and caused injury. After conducting the first of such twelve trials in Oxford, Mississippi,[20] Judge Pepper, over Respondent's objection, sustained a motion by Petitioners to conduct the remaining eleven trials in Greenville, Mississippi.

The basis for Judge Pepper's decision is stated in a detailed, well reasoned, written opinion which hopefully this Court will see fit to review.

No reading of Judge Pepper's opinion, fair or unfair, biased or unbiased, agenda driven or objective, would support a finding that Judge Pepper's decision, to try these remaining cases in Greenville and not Oxford, involved anything more than a perfectly permissible exercise of judicial discretion on the part of this district judge.

This Court has ruled that writs of mandamus are to be issued " . . . only in the *exceptional case* where

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[20] An all white jury impaneled to hear/decide the trial of this case in Oxford, Mississippi, returned a verdict in Plaintiff's favor. But as stated, a panel of the court of appeals vacated this judgment, ruling that Mississippi's three-year Statute of Limitations which begins to run on the date a tort victim sustained "injury," began to run when Sherrie Barnes first learned she had an "illness," i.e., breast cancer, which Koppers claimed was not caused by its chemicals.

there is *clear* abuse of discretion or 'usurpation of judicial power.'"[21]

Judge Pepper obviously possesses "jurisdiction" to decide the venue issue submitted to him. Judge Pepper's decision as to the locations where these trials would occur was clearly within Judge Pepper's "prescribed jurisdiction" – and Respondents do not dispute that assertion.

If courts of appeals panels are free to issue writs of mandamus, with *no finding* that a discretionary venue decision by district judges is in any way "exceptional" or with no finding that a district court's discretion as to venue involves an "usurpation of judicial power," whatsoever, or with *no finding* of any failure to act, when there exists a duty to act, then clear decisions of this Court prescribing the *limited* circumstances under which such writs can issue also mean nothing. If that be this Court's ruling on this petition then this petition should be denied.

Petitioners appreciate the fact that, whether their upcoming trials are tried in Oxford or Greenville – while important to Petitioners and Respondents Koppers[22] to be sure – perhaps will be viewed by this

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[21] Writs of mandamus, traditionally, are employed " . . . to confine an interior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

[22] Respondent's true purpose for seeking issuance of a writ of mandamus from the court of appeals – to compel the district

(Continued on following page)

Court to be of little importance – when compared to other issues which this Court is asked to decide.

But what about a court of appeals which – for whatever reason – grants a writ of mandamus in flagrant disregard of multiple, crystal clear, decisions of this Court?

Would that not be conduct which is of concern to this Court? For after all, this petition does not ask this Court to *construe* or *interpret* any aspect of any decision of this Court – this Court's opinions relating to writs of mandamus simply are not susceptible to misunderstanding. Instead, Petitioners ask this Court to *enforce* the rules of law that its prior decisions clearly express.

But if this Court sees no reason to compel lower courts to follow – not disregard – its prior ruling – then would not courts generally, and the Court of Appeals for the Fifth Circuit specifically, then be free to decide: *When* does this Court mean what its decisions state versus *when* are lower courts free to disregard this Court's rulings, with no consequence?

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court to schedule trials in Oxford, not Greenville – is not stated in Respondent's petition. Though one must wonder whether the prospect of again securing an all White jury versus racially diverse jury that would result from a Greenville trial, constitutes Respondent's purpose.

ARGUMENT

Though the granting of Koppers' second application for writ of mandamus directly contradicted that court's first denial of Koppers' first Application for writ of mandamus – both Applications asking the court of appeals to substitute that court's *discretion* as to where the trials of these eleven remaining cases would be conducted for Judge Pepper's discretion on that issue – the court of appeals refused to resolve these diametrically opposite rulings by these two panels via a request for *en banc* consideration filed by/on behalf of these Petitioners.

But even more startling, the fact that both rulings by the court of appeals: granting Koppers' motion for writ of mandamus in the first place – with no explanation for the basis of that decision – and then refusing to resolve conflicting rulings by two panels of that court *en banc* – again with no explanation – were forthcoming with no regard for multiple decisions of this Court as well as from other panels of the court of appeals.

By granting Koppers second application for writ of mandamus, the court of appeals ignored clear mandates in multiple decisions of this Court. By granting Koppers its venue choice, in disregarding/ignoring/substituting its venue judgment for that of Judge Pepper – with no explanation for its decision and no explanation for its refusal to resolve two conflicting panel decisions.

Since enactment of § 1404(a) in 1948 and the earliest subsequent attempts to obtain interlocutory review of transfer rulings, there have been strenuous critics of using mandamus in this setting. Wright and Miller comment that mandamus is not controversial "if the issue goes to the power of the district court to make the order it did and only a question of law is presented." 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3855 at 325 (3d ed. 2007). By contrast:

> "But a very compelling argument can be made that if there is no question of power, and the only issue is whether the district judge exercised his or her discretion properly in considering the factors mentioned in the statute in granting or refusing the transfer, interlocutory review ought not be available. This is the view of the commentators, it is the view of the American Law Institute, and it has been the view of many distinguished appellate judges."

Id.

The granting of a writ of mandamus by a court of appeals – to compel a district judge to vacate a discretionary decision by such judge – with no explanation for the basis of such a ruling was before this Court in *Will v. United States,* 19 L. Ed. 2d 305 (1967), in language that could not be misunderstood by the court of appeals this Court stated:

> "Due regard, not merely for the reviewing functions of this Court, but for the 'drastic

> and extraordinary' nature of the mandamus remedy, . . . and for the extremely awkward position in which it places the district judge, . . . demands that a court issuing the writ give a reasoned exposition of the basis of the action."

Id.

This Court has held:

> "Because the supervisory writ of mandamus is an extraordinary remedy, we issue one only in extraordinary or compelling situations. *Kerr v. United States,* 426 U.S. 394, 402, 96 S.Ct. 2119, 2123, 48 L. Ed. 2d 725 (1976); *Will v. United States,* 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L. Ed. 2d 305 (1967); *In re Fibreboard Corp.,* 893 F.2d 706, 707 (5th Cir. 1990). '[O]nly exceptional circumstances amounting to a judicial "usurpation of power,'" *Will,* 389 U.S. at 95, 88 S.Ct. at 273, or 'clear . . . abuse of discretion' when 'no other adequate means of obtaining relief is available,' *Fibreboard*, 893 F.2d at 707 (5th Cir. 1990) *(citations omitted in original),* justifies invoking this extraordinary remedy. The petitioner has the burden of establishing by a 'clear and undisputable' showing that he is entitled to the writ."

Mandamus pertaining to the denial or granting of a transfer of venue under section 1404(a) will be issued only if the movant proves that the district court neglected to correctly construe or apply a relevant statute, or to consider the factors relevant to

ruling upon the motion, or abused its discretion in deciding the motion. *In re Volkswagen AG,* 371 F.3d 201, 204 (5th Cir. 2004) *citing Castanho v. Jackson Marine, Inc.,* 650 F.2d 546, 550 (5th Cir. 1981). The factors which the court considers when presented with such a petition are:

a.) Did the district court correctly construe and apply the relevant statues;

b.) Did the district court consider the relevant factors incident to ruling upon a motion to transfer; and

c.) Did the district court abuse its discretion in deciding the motion to transfer.

Volkswagen, 371 F.3d at 202-03; *citing Ex Parte Chas. Pfizer & Co.,* 225 F.2d 720 (5th Cir. 1955); *In re Horseshoe Entm't,* 540 U.S. 1049, 124 S.Ct. 826, 157 L. Ed. 2d 698 (2003).

Decisions from this Court characterize mandamus as a "drastic" and "extraordinary" remedy. This Court in *Bankers Life & Cas. Co. v. Holland,* 98 L. Ed. 2d 111 (1953), stated:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should

> be resorted to only where appeal is clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes."

Id. at 112, 113.

No reading of Judge Pepper's opinion, fair or unfair, biased or unbiased, would support a finding that Judge Pepper's decision to try these remaining cases against Koppers in Greenville or Oxford involved anything more than a perfectly permissible exercise of discretion by that Judge.

Mandamus has traditionally been employed "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Bankers Life & Cas. Co. v. Holland,* supra. In *Kerr v. United States,* 426 U.S. 394, 96 S.Ct. 2119, 48 L. Ed. 2d 725 (1976), this Court, after first acknowledging that a court of appeals' use of mandamus was not limited to "an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction'," nonetheless stated:

> " . . . the fact still remains that 'only exceptional circumstances' amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

A purely discretionary decision, by a district judge on an issue of "venue" that involves no issue of "jurisdiction," is simply not a judicial act which a writ of mandamus is designed to address – even if

such discretionary decision would be deemed to be erroneous.

Speaking of a district court's discretion as to venue, *Bankers Life* involved a suit filed in Florida by an Illinois insurance corporation, who sued multiple parties, including the Insurance Commissioner for the State of Georgia. The Georgia Insurance Commissioner complained that venue as to him was improper. The district court agreed and transferred the action, as to the Georgia Insurance Commissioner from Florida to Georgia, where the Commissioner resided. A writ of mandamus was sought by Petitioners to compel the district court to vacate and set aside the court's order of severance and transfer. The court of appeals dismissed the petition on the grounds that it was not an appropriate remedy under the circumstances of that case.

Since the Florida District Court, which transferred the case to Georgia, had "jurisdiction" with respect to the suit filed by Petitioners as well as jurisdiction as to the Georgia Insurance Commissioner, the district court's decision, to transfer the cause of action, "was made in the course of the exercise of the court's jurisdiction to decide issues properly before it." Even if that *venue decision* was erroneous, this Court ruled, *Mandamus was not proper remedy to address that error.* This Court observed:

> "Its decision against petitioner, even if erroneous – which we do not pass upon – involved

> no abuse of judicial power . . . and is reviewable upon appeal after final judgment."

Bankers Life & Cas. Co. v. Holland, supra.

Mandamus is available, the court in *Bankers Life* ruled, "Only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies they [Writs of Mandamus] are reserved for really extraordinary cases." *Bankers,* 98 L. Ed. 113 (1953).

Judge Pepper's decision involves *no abuse* of discretion, much less a "clear" abuse of discretion. Judge Pepper's decision involves no usurpation of judicial power. To again quote from *Bankers Life:*

> " . . . the All Writs Act is meant to be used only in the exceptional case where there is *clear abuse* of discretion or 'usurpation' of judicial power. . . ."

Bankers, 98 L. Ed. 112 (1953).

There can be no legitimate claim that Judge Pepper exceeded his "lawful exercise" of "prescribed jurisdiction." Yet the court of appeals granted Koppers' petition anyway – and refused to explain its reasons for that ruling, although Judge Pepper provided the court of appeals with a detailed explanation as to the basis for Judge Pepper's discretionary venue judgment. In response, the court of appeals substituted its judgment for that of Judge Pepper with no explanation for the basis of the court of appeals' grant of the writ.

Mandamus, it must be remembered, does not "run the gauntlet of reversible errors." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 382 (1953). Its office is not to "control the decision of the trial court," but rather merely to confine the lower court to the sphere of its discretionary power. *Id.*, at 383.

Disputing the court of appeals' refusal to explain its grant of Koppers' writ of mandamus, Petitioners point to *Will v. United States,* 19 L. Ed. 2d 305 (1967). In *Will,* Petitioner, a federal district judge, ordered the Government to supply certain information requested by the defendant in a bill of particulars in a criminal case. The prosecutor refused to comply on the ground that the request constituted a demand for a list of prosecution witnesses, the production of which Petitioner lacked power to compel under Fed. Rule Crim. Proc. 7(f). Petitioner thereupon indicated his intention to dismiss the indictments against the defendant. The Government petitioned the court of appeals for a writ of mandamus to compel Petitioner to strike the request for information from his bill of particulars order. On the basis of briefs filed, that court initially denied the Government's petition but, without new briefs or oral argument, and without opinion, reversed itself and issued a writ of mandamus directing Petitioner to vacate his order. Petitioner filed for Writ of Certiorari to the United States Supreme Court, in which this Court held "the record in this case discloses no proper justification for the court of appeals to have invoked the extraordinary writ of mandamus to review the

trial court's interlocutory order." *Will*, 389 U.S. 95-107. Further, this Court in *Will* proclaims:

> "without an opinion from the court of appeals we do not know what role, if any, this factor played in the decision below. In fact, we are in the dark with respect to the position of the court of appeals on all issues crucial to an informed exercise of our power of review. . . . We cannot properly identify the questions for decision in the case before us without illumination of this unclear record by the measured and exposed reflection of the court of appeals."

Id. at 107.

The court of appeals rendered a mirror image decision in this present case as in *Will*, by refusing to render an informed, written justification to accompany and support its grant of a writ of mandamus.

In this present case, the deficiency in the record is the failure of the court of appeals to attempt to supply any reasoned justification for its action. This Court in *Will* concluded, "what might be the proper decision upon a more complete record, supplemented by the findings and conclusions of the court of appeals, we cannot and do not say. Hence the writ is vacated. . . ." *Id.* at 107.

Petitioners on this petition are aware of the realities that face them in this Court, as this Court undertakes to decide whether the issues presented by

this petition are of sufficient national importance to warrant this Court's consideration.

Petitioners appreciate the fact that whether they are permitted to try their cases in Oxford or Greenville – while important to Petitioners and Koppers to be sure – in terms of the types of questions this Court is called upon to address is of little importance.

Mandamus is not a punitive remedy. The entire thrust of the Koppers' justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. Petitioners fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. A mandamus from the blue without rationale is tantamount to an abdication of the very expository and supervisory functions of an appellate court upon which Koppers' attempts to justify its writ of mandamus.

Petitioners believe and thus assert that the granting of this writ of mandamus – and the refusal to address the propriety of that ruling *en banc* – constitutes a flagrant disregard by the court of appeals, of multiple, crystal clear, decisions of this Court.

Lack of opinion by the court of appeals precludes any proper appraisal of the basis for its invocation of the extraordinary writ of mandamus.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: January 5, 2010

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-60127

IN RE: KOPPERS INC., formerly known as Koppers Industries Inc.; BEAZER EAST INC.; ILLINOIS CENTRAL RAILROAD CO.

Petitioners

Petition for a Writ of Mandamus to the United States District Court for the Northern District of Mississippi at Oxford

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(Filed Apr. 3, 2009)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is GRANTED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-60129

In Re: KOPPERS INC, formerly known as Koppers Industries Inc; BEAZER EAST INC, formerly known as Beazers Materials and Services Inc

Petitioners

- -

Petition for Writ of Mandamus to the United States District Court for the Northern District of Mississippi, Oxford

(Filed Mar. 16, 2007)

- -

Before KING, HIGGINBOTHAM, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for writ of mandamus is denied.

/s/ SMG CDK PCK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
WESTERN DIVISION

FRED BECK; ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:03CV60-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

CONSOLIDATED WITH

HOPE ELLIS, ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:04CV160-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

ORDER

(Filed May 17, 2006)

This matter comes before the court upon the plaintiffs' *ore tenus* motion to transfer venue from the Western Division to the Greenville Division made on or about May 1, 2006 during the trial of Plaintiff Kenesha Barnes's claims. Upon due consideration of the motion and the defendants' objections thereto made previously in their December 2, 2004 Motion to Return this Matter for Trial in the Western Division, the court finds as follows, to-wit:

Beck, et al. v. Koppers, Inc., et al., Cause Number 3:03cv60, originally involved 110 plaintiffs and was

filed on March 20, 2003 in the Western Division of the Northern District of Mississippi. As is customary, the court initially set the trial to occur at the undersigned's duty station, Greenville, Mississippi, which resides in the Greenville Division of the Northern District of Mississippi. On March 16, 2005, the court granted the defendants' Motion to Return this Matter for Trial in Western Division, thereby resetting the trial to occur in the U.S. Courthouse in Oxford, Mississippi.

On April 18, 2005, the court severed the claims of 98 of the 110 plaintiffs and ordered that the claims of the remaining 12 would be tried separately. Since the court was faced with one trial when it granted the defendants' Motion to Return this Matter for Trial in Western Division, the court made it known to the parties after the order setting 12 separate trials that the last 10 trials would occur in Greenville, Mississippi.

Though the parties had requested five to six weeks for trial, the court tried the first trial involving the claims of Plaintiff Kenesha Barnes on behalf of the Estate of Sherrie Barnes in Oxford for just over three weeks – i.e., from April 17, 2006 to May 5, 2006 for the compensatory damages phase and from May 11-12, 2006 for the punitive damages phase. At or near the end of the compensatory damages phase, the plaintiff's made an *ore tenus* motion to transfer the venue of the second trial to Greenville as the court had already done with the last 10 trials. The defendants relied on their arguments in their original

Motion to Return this Matter for Trial in Western Division in opposition to the request.

Having experienced the first three-week trial, the court concludes that the motion to transfer all of the remaining 11 cases back to Greenville should be granted. Title 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought. Though the language "the convenience of parties and witnesses, in the interest of justice" might suggest otherwise, "it is well established that the interest of justice is a factor to be considered on its own and an important one and that the interest of justice may be decisive in ruling on a transfer motion. . . ." 15 Fed. Prac. & Proc.2d § 3854 (citing *e.g., Coffey v. Van Dorn Iron Works,* 796 F.2d 217, 222 (7th Cir. 1986) ("The 'interest of justice' analysis relates, then, to the efficient functioning of the courts, not to the underlying dispute.").

The reasons weighing in favor of transfer follow. With regard to the convenience of the parties and witnesses, it is only 25 miles farther to Greenville from Grenada (home of the subject wood-treatment plant and the plaintiffs) than from Grenada to Oxford. Unlike Oxford, there is an airport in Greenville for the parties' experts and accommodations are more readily available in addition to costing less than those in the busy college-town of Oxford. Furthermore, it is just as easy to reach Greenville by car as it is to reach Oxford.

There are five factors weighing in favor of transfer with regard to § 1404(a)'s interest of justice factor. First, 28 U.S.C. § 1393, the divisional venue statute, was repealed in 1988 as part of the Judicial Improvements and Access to Justice Act. Second, as mentioned above, the court would have been far more reluctant to grant the defendants' Motion to Return this Matter for Trial in Western Division had it known the case would be separated into twelve separate trials. Furthermore, since the court's original transfer order, the court consolidated the case of *Ellis, et al. vs. Koppers, Inc. et al.*, Cause Number 3:04cv160 with the instant case, thereby adding 948 additional plaintiffs. It is highly burdensome and inefficient for the court to try twelve (possibly more) 3-to-6-week trials 145 miles away from its duty station. Fourth, given there is only a 25 mile difference between holding a trial in Greenville versus Oxford, trying twelve 3-to-6-week trials in Oxford poses an unreasonable burden on the tax-payers who have to pay the undersigned and his law clerks, secretary, courtroom deputy, and court reporter thousands of dollars for mileage, meals, and hotel accommodations. Fifth, since the instant motion does not involve transfer of venue from one district to another but rather from one division to another, the only practical difference between trying the case in Greenville or Oxford is the jury pool given that in either event the parties will retain the same judge. The defendants have proffered no clear and convincing evidence that there is any difference between the quality of a jury in Greenville as opposed to one in Oxford. *See In re Horseshoe*

Entertainment, 305 F.3d 354, 358 (5th Cir. 2002) (possibility of prejudice, such as larger verdicts, in one district or another must be established by clear and convincing evidence; vague and indefinite circumstances will not suffice). Finally, it is also unduly burdensome on the Greenville courthouse to be without a district judge for twelve 3-to-6-week periods 145 miles away since there would be no district judge to attend to emergency or criminal matters that inevitably arise in the course of the court's business.

IT IS THEREFORE ORDERED AND ADJUDGED that:

(1) The plaintiffs' *ore tenus* motion to transfer the remaining 11 separate trials in this matter is hereby **GRANTED**; therefore,

(2) All remaining trials in this matter will be held at the U.S. Courthouse in Greenville, Mississippi.

SO ORDERED this the 17th day of May, A.D., 2006.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
WESTERN DIVISION

FRED BECK; ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:03CV60-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

CONSOLIDATED WITH

HOPE ELLIS, ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:04CV160-P-D

KOPPERS, INC., f/k/a KOPPERS INDUSTRIES, INC.; ET AL., DEFENDANTS.

ORDER

(Filed Jul. 25, 2006)

This matter comes before the court upon Defendant Koppers, Inc. and Beazer East, Inc.'s Motion for Reconsideration of May 17, 2006 Order Transferring This Matter for Trial to the Greenville Division, or, in the Alternative, Motion for Certification of Issue for Interlocutory Appeal [1065-1]. After due consideration of the motion and the responses filed thereto, the court finds as follows, to-wit:

For the reasons discussed in its May 17, 2006 Order, in which the court transferred the location of trial from Oxford to Greenville, the instant motion

should be denied. The court notes that in the subject Order, the court did not transfer venue in this case from the Western Division to the Greenville Division; rather, it simply changed the location of trial. It is within the practice of the Northern District of Mississippi to allow a court the discretion to try any case assigned to a given judge at his duty station. In the Northern District, when one files in a given division, the judge is assigned randomly. This is opposed to the Southern District of Mississippi wherein a given division is assigned to a certain judge.

IT IS THEREFORE ORDERED AND ADJUDGED that Defendant Koppers, Inc. and Beazer East, Inc.'s Motion for Reconsideration of May 17, 2006 Order Transferring This Matter for Trial to the Greenville Division, or, in the Alternative, Motion for Certification of Issue for Interlocutory Appeal [1065-1] is **DENIED** in both respects.

SO ORDERED this the 25th day of July, A.D., 2006.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 09-60127

IN RE: KOPPERS INC., formerly known as Koppers Industries Inc.; BEAZER EAST INC.; ILLINOIS CENTRAL RAILROAD CO.

Petitioners

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

---

ON PETITION FOR REHEARING EN BANC

(Filed Oct. 7, 2009)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before KING, DENNIS, and OWEN, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Motion for Reconsideration, the Motion for Reconsideration is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James L. Dennis
United States Circuit Judge

Judge Smith and Judge Barksdale did not participate in the consideration of the petition for rehearing en banc.

No. 09-808

In The Supreme Court of the United States

FRED BECK, ET AL.,

Petitioners,

v.

KOPPERS INC., F/K/A
KOPPERS INDUSTRIES, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioners have presented compelling reasons to grant the Petition, where the Petitioners have not demonstrated that the Fifth Circuit Court of Appeals' order granting a writ of mandamus implicates any of the criteria under Supreme Court Rule 10 for granting certiorari and where Petitioners' principal argument was waived by not raising it in their Petition for Rehearing *En Banc* before the Fifth Circuit.

2. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit Court of Appeals acted within its discretion and properly exercised its supervisory authority in granting a writ of mandamus directing the District Court to conduct all future trials in this mass tort litigation in the Western Division of the Northern District of Mississippi, which is the division where: (a) Petitioners filed the actions, (b) the litigation is still pending, (c) the District Court originally deemed that the interest of justice and the convenience of the parties and witnesses required trial to be held, and (d) federal law requires the trial to be held; instead of the Greenville Division of the Northern District of Mississippi, a division which has no connection to the parties, the witnesses or the facts of these cases but is where the trial judge has his chambers.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Koppers Inc. f/k/a Koppers Industries, Inc. and Beazer East, Inc. state the following:

Respondent Koppers Inc. is a wholly-owned subsidiary of Koppers Holding Inc., a publicly traded company.

Respondent Beazer East, Inc., through various privately-held subsidiaries, is ultimately owned by HeidelbergCement AG, a German publicly traded company.

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OPINIONS BELOW

In addition to the orders set forth in Petitioners' Petition for Writ of Certiorari and included in Petitioners' Appendices, Respondents add the following opinions which are reprinted in Respondents' Appendices ("App."):

(A) The *sua sponte* Order of Magistrate Judge Jerry A. Davis, dated November 17, 2004, setting the *Beck* trial in the Greenville Division in Greenville, Mississippi, is reprinted at App. F.

(B) The District Court's Order, dated March 16, 2005, finding that the Western Division is the most convenient forum for the parties and the witnesses and setting the *Beck* trial in the Western Division is reprinted at App. G.

(C) The District Court's Order, dated January 29, 2009, reaffirming its decision to transfer future trials to the Greenville Division and refusing to reconsider its May 17, 2006 and July 25, 2006 Orders is reprinted at App. H.

(D) The Fifth Circuit's Order, dated April 3, 2009, denying Respondents' Motion for Leave to Appeal an Interlocutory Order is reprinted at App. I.

INTRODUCTION

Petitioners ask the Court to review the Fifth Circuit's decision to grant a writ of mandamus directing

the District Court to conduct all future trials in this litigation in the Western Division of the Northern District of Mississippi. They complain that the Fifth Circuit acted improperly in granting the writ of mandamus without providing an explanation for its decision. Petitioners' primary grievance is that the Fifth Circuit should have explained why it granted the writ of mandamus – a point not relied upon in their Petition for Rehearing to the Fifth Circuit. Only as an afterthought do Petitioners even challenge the merits of the Fifth Circuit's decision to grant the writ of mandamus.

Petitioners have articulated no "compelling reason" why this Court should grant certiorari in this case. The issues raised by the Petition do not involve a circuit split relating to some important matter or any conflict between the court of appeals and state courts on an important federal question. They do not invoke an important federal question that should be settled in the first instance by this Court. They do not involve an important federal question that conflicts with relevant decisions of this Court. This Court has generally refused to hear cases involving the use of mandamus in the context of transfers under 28 U.S.C. § 1404, and there is no compelling reason why the Court should alter course now in this case. This is especially true where the Fifth Circuit acted properly in exercising its discretionary, supervisory authority and using its mandamus powers to prevent the District Court from acting erroneously and from clearly abusing its discretion. This Court's decision in *Will v.*

U.S., 389 U.S. 90 (1967), does not warrant a different result and does not provide a compelling reason for this Court's review. The statement in *Will* that the court of appeals in that case should have provided an explanation for the basis of its mandamus decision is limited to the facts of that case and does not have the broad applicability argued by Petitioners. Moreover, Petitioners waived their argument that the Fifth Circuit failed to provide a detailed opinion with its mandamus decision by not raising the issue before the Fifth Circuit in their Petition for Rehearing *En Banc*.

In addition, certiorari is not warranted in this case because the undisputed facts and procedural history set forth in the briefs and in the record below clearly established why it was necessary for the Fifth Circuit to grant the writ of mandamus. The Fifth Circuit properly used its mandamus authority to reverse what it called an "unprecedented" decision by the District Court to hold future trials in this litigation in the Greenville Division of the Northern District of Mississippi for its own convenience and for the convenience of its staff. There is no dispute that the Greenville Division has no connection to the parties, witnesses or facts of this case. In contrast, the Western Division is where Petitioners originally filed the actions, where the cases are still pending, and where the District Court previously determined was the most convenient forum for the parties and witnesses. It is where all of the parties and where the bulk of the witnesses reside, where the alleged torts

occurred, and where federal law and the interest of justice require that the trials take place. Moreover, the District Court plainly exceeded its authority and acted contrary to 28 U.S.C. §§ 104 and 1404 in granting Petitioners' *ore tenus* motion to transfer the location of all future trials from the Western Division. As a result, the Fifth Circuit's decision to grant the writ of mandamus should not be disturbed on appeal to this Court.

Petitioners have not carried their burden of demonstrating any compelling reasons why their Petition for a Writ of Certiorari should be granted. Therefore, the Petition should be denied.

STATEMENT OF THE CASE

A. Petitioners Filed This Mass Tort Litigation In The Western Division Of The Northern District of Mississippi.

This Petition arises out of mass toxic tort litigation comprised of several cases filed by the same plaintiffs' counsel on behalf of more than one thousand plaintiffs in Mississippi state and federal courts. Petitioners allege that they have suffered various personal injuries and/or property damages as a result of Respondents' negligent operation of a wood-treating plant located in Grenada, Mississippi. Grenada is located in Grenada County in the Western Division of the Northern District of Mississippi.

Petitioners commenced two federal actions in the Western Division of the Northern District of Mississippi. Petitioners filed the first action, *Fred Beck, et al., v. Koppers Industries, et al.*, Civil Action No. 3:03CV-60-P-D, which included 110 plaintiffs, on March 18, 2003, in Oxford, Mississippi, which is in the Western Division. Petitioners then filed the second action, *Hope Adams Ellis, et al. v. Koppers, Inc., et al.*, Civil Action 3:04CV-160-P-D, which included 1130 plaintiffs, on August 24, 2004, in the Western Division. Subsequently, the *Beck* plaintiffs were ordered severed, and Petitioners re-filed the individual cases again in the Western Division, while the *Ellis* case was stayed. The cases were assigned to the Honorable District Court Judge W. Allen Pepper, Jr., whose chambers are located in the Greenville Division in Greenville, Mississippi.

B. The District Court Originally Determined That The Interest Of Justice And The Convenience Of The Parties And Witnesses Require That Trial Be Held In The Western Division.

The procedural history leading to this Petition begins on November 17, 2004, when Magistrate Judge Jerry A. Davis *sua sponte* set the first *Beck* case for trial in Greenville, Mississippi. (App. F.) The city of Greenville, Mississippi, is located in the Greenville Division, not the Western Division.

Thereafter, in an Order dated March 16, 2005, the District Court granted Respondents' motion to conduct all trials in the Western Division and denied Petitioners' motion to have all cases tried in the Greenville Division. (App. G.) In that decision, the District Court expressly held that "the convenience of the parties and witnesses (taking no account of the attorneys' convenience) and *the interest of justice weigh heavily in favor of transfer to the Western Division.*" (*Id.* at 20 (emphasis added)). The District Court emphasized that Petitioners "filed in the Western Division and the vast majority of the witnesses and parties reside, and the majority of the events giving rise to the action occurred, in the Western Division." (*Id.* at 19-20.) In their submission in support of this Petition, Petitioners omitted any reference to this initial ruling by the District Court finding that Oxford, Mississippi, in the Western Division, was the most convenient and appropriate location for the trial of these cases.

C. After The First Trial Took Place In The Western Division, The District Court Ordered Subsequent Trials Be Held In The Greenville Division.

On April 17, 2006, the claims of the first *Beck* plaintiff, Kenesha Barnes on behalf of the estate of her mother, Sherrie Barnes, were tried in the Western Division. On May 5, 2006, two weeks into the three-week *Barnes* trial, Petitioners once again moved the District Court to transfer all remaining trials to the Greenville Division. By Order dated May 17,

2006, the District Court reversed course, ignored its prior ruling that the Western Division was the most convenient and appropriate location for the trial, and granted Petitioners' *ore tenus* motion to transfer all remaining trials to the Greenville Division. (App. C.)

The District Court subsequently denied Respondents' motion for reconsideration in an Order dated July 25, 2006. (App. D.) In that Order, the District Court emphasized that it "did not transfer venue in this case from the Western Division to the Greenville Division; rather, it simply changed the location of the trial." (*Id.* at 9.) The District Court further stated, without providing any authority, that "[i]t is within the practice of the Northern District of Mississippi to allow a court the discretion to try any case assigned to a given judge at his duty station." (*Id.*)

D. The Fifth Circuit Described The District Court's Order Transferring Future Trials As "Unprecedented."

Respondents appealed the District Court's judgment on a jury verdict in favor of Kenesha Barnes and raised the trial location issue on appeal.[1] On

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[1] At the same time, Respondents filed a Petition for Writ of Mandamus to the Fifth Circuit with respect to the issue of future trials. Prior to the Fifth Circuit's decision on the *Barnes* appeal, a separate panel of the Fifth Circuit denied the Petition for Writ of Mandamus without comment. (App. B.) Petitioners highlight the Fifth Circuit's denial of the first Petition for Writ of Mandamus and claim that by "such denial, such panel refused

(Continued on following page)

June 30, 2008, the Fifth Circuit Court of Appeals reversed the judgment of the District Court in *Barnes* and rendered judgment in favor of Respondents. Although it did not resolve the issue of the location of future trials because it had determined that Barnes' claim was barred by the statute of limitations, the Fifth Circuit described the District Court's order transferring all future trials to Greenville as "*unprecedented*" and suggested that these procedural issues "raise[d] *troubling questions* about this handling of the case" by the District Court. *Barnes v. Koppers Inc.*, 534 F.3d 357, 359 (5th Cir. 2008) (emphasis added).

E. The District Court Reaffirmed Its Prior Decision To Transfer All Trials To The Greenville Division.

On November 25, 2008, the District Court held a status conference in chambers with counsel for all parties to discuss, *inter alia*, how the remaining cases and trials would be affected by the Fifth Circuit decision in *Barnes*. The District Court invited the Respondents to file a motion to transfer the next trial

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to direct Judge Pepper to conduct future trials against Koppers, in Oxford, Mississippi." (Pet. at 6-7.) Petitioners argue that the Fifth Circuit's later grant of the second Petition for Writ of Mandamus contradicts the earlier ruling. (*Id.* at 16.) However, no inferences should be raised from the Fifth Circuit's prior denial of the Petition for Writ of Mandamus. At the time of the previous denial, the same issue was already pending in the substantive appeal before the Fifth Circuit.

to the Western Division. On December 31, 2008, Respondents filed a motion to reconsider the District Court's May 17, 2006 and July 25, 2006 Orders setting trial in Greenville, or, in the alternative, for interlocutory appeal.

On January 29, 2009, the District Court reaffirmed its decision to transfer future trials to the Greenville Division and refused to reconsider its May 17, 2006 and July 25, 2006 Orders. (App. H.) The District Court reiterated its prior erroneous § 1404(a) analysis relying on irrelevant facts including its own convenience and that of its staff. (*Id.*) It ignored its own initial determination that the interest of justice and the convenience of the parties and witnesses required trial to be held in the Western Division. It ignored or misapplied the public and private interest factors governing transfer under § 1404(a). Additionally, the District Court dismissed 28 U.S.C. § 104, which calls for trials of cases pending in the Western Division to be held in Oxford, as an "anachronism." (*Id.* at 28.) Instead, it cited the "inherent discretion to control its docket" as the basis for supporting the "Northern District's unwritten practice of allowing the discretion to try any case assigned to a given judge at his or her duty station." (*Id.*) The District Court then certified the issue for interlocutory appeal to the Fifth Circuit. (*Id.* at 34.)

F. The Fifth Circuit Properly Granted Respondents' Petition For Writ Of Mandamus.

Respondents filed both a Motion for Leave to File an Interlocutory Appeal and a Petition for a Writ of Mandamus with the Fifth Circuit Court of Appeals. The Petition for Writ of Mandamus asked the Fifth Circuit to issue a writ directing the District Court to conduct all future trials in this litigation in the Western Division of the Northern District of Mississippi – the division where Petitioners originally filed the actions and where the litigation is still pending, the division that the District Court originally found was the most convenient for the parties and witnesses and where the interest of justice required trial to be held, and the division where the alleged wrongful conduct took place.[2] Having considered the briefs, which provided a complete record of the factual and procedural history leading to the requested mandamus relief, the Fifth Circuit panel granted the Petition for Writ of Mandamus on April 3, 2009. (App. A.) On April 20, 2009, Petitioners filed a Petition for Rehearing *En Banc*. In their *en banc* petition, Petitioners never complained or otherwise raised the issue that the Fifth Circuit panel granted the Petition for Writ of Mandamus without explanation. On October 7, 2009, the Fifth Circuit, in a *per curiam* decision, denied the Petition for Rehearing *En Banc* noting that "[n]o member of the panel nor judge in

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[2] The Fifth Circuit denied Respondents' Motion for Leave to Appeal an Interlocutory Order on April 3, 2009. (App. I.)

regular active service of the court [] requested that the court be polled on Rehearing En Banc." (App. E.)

REASONS FOR DENYING THE PETITION

A. Petitioners Have Not Raised Any Compelling Reason Why The Writ Of Certiorari Should Be Granted.

Petitioners do not address the standard governing review of their Petition for Writ of Certiorari because they know that they cannot meet this strenuous standard. Supreme Court Rule 10 directs that "[a] petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Petitioners have provided this Court no compelling reason why their Petition for Writ of Certiorari should be granted.

The issues raised by the Petition do not involve a circuit split relating to some important matter, a conflict between the court of appeals and state courts on an important federal question, an important federal question that should be settled by this Court, or an important federal question that conflicts with the relevant decisions of this Court. The Petitioners do not challenge whether a writ of mandamus is an appropriate mechanism to review a district court's improper § 1404 decision. In fact, Petitioners concede that mandamus pertaining to a transfer of venue under § 1404(a) "will be issued only if the movant

proves that the district court neglected to correctly construe or apply a relevant statute, or to consider the factors relevant to ruling upon the motion, or abused its discretion in deciding the motion." (Pet. at 18 (citing *In re Volkswagen AG*, 371 F.3d 201, 204 (5th Cir. 2004)); *see also In re Volkswagen AG*, 545 F.3d 304, 309 (5th Cir. 2008) ("There can be no doubt therefore that mandamus is an appropriate means of testing a district court's § 1404(a) ruling."), *cert. denied*, 129 S. Ct. 1336 (2009). The Fifth Circuit granted the mandamus precisely for that reason – to correct the District Court's error and clear abuse of discretion.

Instead, the primary reason Petitioners request review from this Court is that the Fifth Circuit failed to provide an explanation for its decision to grant the writ of mandamus – a decision that was fully supported by the briefs and the record below. That is not a sufficiently compelling reason to warrant review by this Court. As this Court has explained regarding the rule pertaining to the grant of certiorari, "'[s]pecial and important reasons' imply a reach to a problem beyond the academic or the episodic."[3] *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). This Court need not grant certiorari simply because

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[3] The precursor to the current "compelling reason" standard for granting the writ of certiorari set forth in Supreme Court Rule 10 was the "special and important reason" standard in former Supreme Court Rule 19. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73 (1955).

Petitioners feel aggrieved that the Fifth Circuit's ruling was not accompanied by a detailed opinion or explanation of the basis for its decision, especially where the mandamus decision is fully supported by the briefs and record. The U.S. Supreme Court does not "sit for the benefit of the particular litigants." (*Id.*)

B. This Court Has Repeatedly Refused To Grant Certiorari In Cases Employing Mandamus In The Context Of Transfers Under 28 U.S.C. § 1404.

In addition to the fact that Petitioners have not met their burden of demonstrating that there are any compelling reasons why this Court should grant certiorari in this case, this Court has repeatedly refused to grant certiorari to review the use of mandamus in the context of transfers under 28 U.S.C. § 1404. For example, just last year, this Court denied certiorari in another case where the Fifth Circuit granted a writ of mandamus for failure to transfer a case under § 1404(a). *See In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1336 (2009).

Before *Volkswagen*, this Court has turned down numerous opportunities over the last five decades to question the use of mandamus to review a District Court's transfer decisions. *See, e.g., In re Horseshoe Entertainment*, 337 F.3d 429, 431-35 (5th Cir. 2003) (granting mandamus to compel a transfer of venue and "recogniz[ing] the availability of mandamus as a limited means to test the district court's discretion in

issuing transfer orders"), *cert. denied*, 540 U.S. 1049 (2003); *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378 (3d Cir. 2002) (holding that "we, like other courts, have held that mandamus is the appropriate mechanism for reviewing an allegedly improper transfer order"), *cert. denied*, 537 U.S. 1148 (2003); *see also Matter of Skupniewitz*, 73 F.3d 702 (7th Cir. 1996), *cert. denied*, 517 U.S. 1124 (1996); *Toro Co. v. Alsop*, 565 F.2d 998, 1000 (8th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *Shutte v. Armco Steel Corp.*, 431 F.2d 22 (3d Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); *Lemon v. Druffel*, 253 F.2d 680, 685 (6th Cir. 1958), *cert. denied*, 358 U.S. 821 (1958); *Chicago Rock Island & Pac. R.R. v. Igoe*, 220 F.2d 299, 304-05 (7th Cir. 1955), *cert. denied*, 350 U.S. 822 (1955). Petitioners have presented no compelling reason why this case should warrant a different disposition and why the Court should grant certiorari now.

C. The Fifth Circuit Properly Exercised Its Discretion In Issuing A Writ Of Mandamus Under Its Supervisory Authority Over District Courts.

The issuance of a writ of mandamus is generally a matter of discretion for the reviewing court. *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n.8 (1964). Certiorari should not be granted in this case because the Fifth Circuit properly exercised its discretion and used the writ of mandamus to exercise its supervisory authority over the District Court. As discussed above, this litigation involves two separate lawsuits

involving over 1,000 individual personal injury claims, and the Fifth Circuit was more than justified in using its mandamus powers to direct the District Court to act in accordance with federal law.

This Court has held that the writ of mandamus may issue to supervise and control district courts. *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *Schlagenhauf*, 379 U.S. at 110-12. In *La Buy*, this Court stated unequivocally that "supervisory control of the District Courts by the Court of Appeals is necessary to proper judicial administration in the federal system." *La Buy*, 352 U.S. at 259-60. The Court added that "[t]he All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in [] exceptional circumstances." (*Id.* at 260.) Far from limiting the use of the writ, *La Buy* provided courts of appeals discretion in the use of mandamus, especially in circumstances where the district court commits persistent errors. (*Id.* at 255, 258.)

Following the Supreme Court's decision in *La Buy*, the courts of appeals have used this discretionary supervisory authority to issue writs of mandamus in many circumstances to control their district courts. *See, e.g., LaSalle Nat'l Bank v. First Conn. Holding Group, LLC*, 287 F.3d 279, 292-93 (3d Cir. 2002) (holding that the All Writs Act authorized the court of appeals to use its supervisory power to reassign a case to a different judge on remand); *In re Va. Elec. & Power Co.*, 539 F.2d 357, 365 (4th Cir. 1976) ("In recent years, however, federal courts, with the Supreme Court's approval, have come to appreciate

the usefulness and flexibility of mandamus in other, less extreme, situations. In particular, mandamus has emerged as an appropriate remedy in the supervision of district courts by the various courts of appeals."); *Knight v. Alsop*, 535 F.2d 466, 469 (8th Cir. 1976) ("In this particular instance, judicial economy can be served by exercising the 'supervisory control of the District Courts . . . necessary to proper judicial administration in the federal system.'"). In summary, mandamus is a valuable tool for the courts of appeals to use in supervising and controlling district courts.

In granting the writ of mandamus in this case, the Fifth Circuit was simply exercising its discretionary, supervisory authority to prevent the District Court from acting erroneously and to ensure that the District Court stayed within the boundaries of its statutory authority. As discussed above, the issue of the District Court's order transferring any future trials from the Western Division to the Greenville Division was initially raised and briefed in the appeal of the *Barnes* trial to the Fifth Circuit. The Fifth Circuit had already noted in its *Barnes* opinion that "[Respondents] challenge[ ] numerous rulings by the district court, including . . . its *unprecedented* order transferring any future trials in the case to another division within the Northern District of Mississippi." *Barnes*, 534 F.3d at 359 (emphasis added). While the Fifth Circuit warned that "[m]any of these issues [including the transfer of future trials to Greenville] raise troubling questions about the handling of this case, which is the first to be tried in an 'inventory' of

several hundred similar suits against Beazer and Koppers pending on the district court's docket," the Fifth Circuit ultimately did not reach the issue of the location of the trial because it found that Barnes' claim was barred by the statute of limitations. (*Id.*)

As in *La Buy* where this Court approved the use of mandamus to prevent or to deter the recurrence in the future of an erroneous practice that the court of appeals feared might arise and therefore wished to discourage, the Fifth Circuit in this case properly used the writ of mandamus to effect "supervisory control" over the District Court to further "proper judicial administration of the federal system." The Fifth Circuit acted properly and within the permissible mandamus authority to vacate the District Court's unprecedented and unauthorized orders transferring the trial to another division within the District that had no connection to the parties, the witnesses or the facts of the case.

D. The *Will* Decision Does Not Require This Court To Grant Certiorari In This Case.

Petitioners can cite to no rule in the Federal Rules of Appellate Procedure or any local rule that requires the Fifth Circuit to issue an opinion for every grant of mandamus or supervisory order. Instead, Petitioners rely on this Court's decision in *Will v. U.S.*, 389 U.S. 90 (1967), which they assert requires courts of appeals to provide a detailed explanation of their legal reasoning when issuing a mandamus order. Petitioners contend that the Fifth Circuit

disregarded this Court's decision in *Will* in granting the writ of mandamus and failing to "give a reasoned exposition for the basis for its action." (*Id.* at 107.) However, Petitioners' argument is flawed in numerous respects.

First, Petitioners' reliance on *Will* is deficient in that Petitioners have not preserved for appeal the issue of whether the Fifth Circuit erred in failing to provide an explanation for the basis of its action. Even after the Fifth Circuit panel granted Respondents' Petition for Writ of Mandamus without an opinion, Petitioners never once complained in their Petition for Rehearing *En Banc* that such a grant of mandamus was flawed because it was not accompanied by an opinion. In fact, Petitioners did not cite to the *Will* decision for this proposition in seeking rehearing. This issue was never raised before the Fifth Circuit and is being presented for the first time in this Petition. Thus, Petitioners have waived this issue on appeal. *U.S. v. New York Telephone Co.*, 326 U.S. 638, 651 n.18 (1946) (finding that a point raised for the first time before the Supreme Court would not be considered); *Walters v. City of St. Louis*, 347 U.S. 231, 233 (1954) (finding that the Supreme Court will not undertake to review what the court below did not decide).

Second, even if the Court were to consider Petitioners' belated argument, *Will* does not apply because it is distinguishable and does not have the broad applicability argued by Petitioners. In *Will*, the Court reversed the court of appeals' order granting

mandamus to require a district judge to strike a portion of his order directing the Government to file a bill of particulars in a criminal case. The Court found that it was necessary for the court of appeals to disclose what it objected to in the district court's conduct, what the court of appeals thought was the proper scope of the bill of particulars and whether any constitutional limitations governing criminal actions limit the discretion of the district court. *Will*, 389 U.S. at 104-06. Such specific clarification was necessary in *Will* because the subject of the writ of mandamus concerned requests in defendant's bill of particulars that sought specific categories of information concerning any oral statements of the defendant relied upon by the Government to support the charge in the indictment, including names and addresses of the persons to whom such statements were made, the times and places at which they were made, whether the witnesses to the statements were government agents and whether any transcripts or memoranda of the statements had been prepared by the witnesses and given to the Government.

Thus, the mandamus remedy in *Will* involved a very fact-intensive inquiry and "neither the record before [the Court] nor the cryptic order of the Court of Appeals justifie[d] the invocation of the extraordinary writ in this case." (*Id.* at 98.) In fact, the Court made repeated complaints about the "unclear record" and "deficiencies in the record," noting that the "record before us simply fails to demonstrate the necessity

for the drastic remedy employed by the Court of Appeals." (*Id.* at 104, 106.)

The facts and the record in the *Will* case stand in stark contrast to the present action where the only issue on mandamus was whether the District Court had exceeded its authority and abused its discretion by ordering all future trials in this litigation be transferred to another division within the Northern District of Mississippi in contravention of federal statute and local rules. In this case, there was no need for a detailed explanation by the Fifth Circuit because there was no dispute as to the facts or the procedural history, and the briefing provided a substantial and complete record that could serve as the factual foundation for the Fifth Circuit's ruling. Thus, the only issue for the Fifth Circuit to decide in considering the mandamus petition was whether the District Court had any legal authority to transfer the trials to another division or whether the District Court acted outside the lawful exercise of its prescribed authority.

Finally, the *Will* case is not applicable to the present action because it involved the use of the mandamus remedy in the context of a criminal case. The *Will* court acknowledged that the use of mandamus in criminal actions involved different constitutional considerations than would be raised in using the mandamus remedy in civil cases. As the Court stated, "We also approach this case with an awareness of additional considerations which flow from the fact that the underlying proceeding is a criminal

prosecution." (*Id.* at 96.) The Court also noted, "[w]e have pointed out that the fact this case involves a criminal prosecution has contextual relevance." (*Id.* at 100, n.10.) The *Will* court suggested that the use of mandamus in criminal cases should be used sparingly because "[m]andamus, of course, may never be employed as a substitute for appeal in derogation of these clear policies" against appeal by the Government in criminal cases and the constitutional limitations for a speedy trial and against double jeopardy in criminal cases. (*Id.* at 96-97.) Given the importance that the Court itself placed on the fact that the *Will* case was guided by considerations of criminal law, the *Will* case simply has no applicability to the present civil action.[4]

E. The Fifth Circuit Properly Granted Mandamus In This Case Because The District Court Lacked The Authority To Transfer The Location Of All Future Trials To Another Division Over The Objections Of Respondents.

For the various reasons stated above, this Court need not even consider the merits of the Fifth Circuit's decision in concluding that this case does not warrant its review. Nevertheless, should this Court examine the facts of this case and the procedural

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[4] The limited applicability of the *Will* decision is also established by the fact that the U.S. Supreme Court has never again cited to the *Will* decision in requiring detailed findings of fact and conclusions for the grant of mandamus.

history leading to the Fifth Circuit's grant of the writ of mandamus, there is little doubt that this Court should deny certiorari.

1. Mandamus Is Proper When The District Court Acts Beyond Its Powers In Transferring A Case Under 28 U.S.C. § 1404.

First, the Fifth Circuit adhered to this Court's mandamus standard and properly issued the writ of mandamus to correct an erroneous application of the federal transfer statute. The District Court's orders transferring all remaining trials from the Western Division – the division where these cases were originally filed, where the alleged tortious conduct took place, where the cases still remain, and where the District Court has already found that the trial must take place in the interest of justice and the convenience of the witnesses and parties – to the Greenville Division is precisely the drastic and extraordinary circumstances that warrant the use of mandamus to correct. Mandamus is proper if the district court either commits a "clear abuse of discretion" or engages in "conduct amounting to usurpation of the judicial power." *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 309 (1989); *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004). The District Court lacked the statutory authority to transfer the location of future trials to another division, and it clearly abused its discretion in making such an order. This Court has expressly sanctioned the use of mandamus under

such "exceptional circumstances" amounting to "a clear abuse of discretion." *Cheney*, 542 U.S. at 380.

This Court has never found that courts of appeals could not use mandamus review to determine the appropriateness of a district court's transfer decision under 28 U.S.C. § 1404. In fact, numerous circuit courts of appeals have relied on this Court's precedents in explicitly recognizing the use of mandamus as a means of policing and testing the district court's discretion in the context of § 1404. *See, e.g., Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 691 n.2 (10th Cir. 1965) ("Mandamus is an appropriate remedy to test the validity of the transfer order.") (citing *Hoffman v. Blaski*, 363 U.S. 335 (1960); *Van Dusen v. Barrack*, 376 U.S. 612, 615 n.3 (1964)); *Volkswagen*, 545 F.3d at 309 ("There can be no doubt therefore that mandamus is an appropriate means of testing a district court's § 1404(a) ruling."), *cert. denied*, 129 S. Ct. 1336 (2009).

2. The District Court Lacked The Authority To Transfer The Location Of All Future Trials To Another Division Over Respondents' Objection.

The Fifth Circuit properly granted the writ of mandamus in this case because the District Court lacked the authority to transfer the location of all future trials to another division over the objection of Respondents. 28 U.S.C. § 1404 governs the district court's authority to transfer to another location either

the entire case or a particular proceeding.[5] In addition, 28 U.S.C. § 104 provides the mandatory locations for a trial set within a division and directs that trials for cases pending in the Western Division of the Northern District of Mississippi must be held in Oxford, Mississippi.

No appropriate construction of § 1404 affords the District Court the authority to transfer the location of future trials in this litigation. Section 1404(a) does not provide the District Court the authority to transfer the location of all future trials from Oxford to Greenville, as the District Court has not transferred the venue of the entire "action." Moreover, § 1404(b) cannot serve as the basis for transferring the trial to the Greenville Division given Respondents' objection to a change of the trial location. *See, e.g., Sikes v. Alamo Crane Serv., Inc.*, 2006 WL 3454795, *1 (S.D. Tex. 2006) ("28 U.S.C. § 1404(b) is inapplicable: The motion to transfer is opposed – it is not 'with consent' of all parties."). Finally, § 1404(c) is not applicable because the District Court did not transfer the trial to another location within the Western Division but to a different division altogether. In short, the District Court plainly acted beyond its statutory authority

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[5] Specifically, § 1404(a) provides to the district court the authority to transfer venue of the entire action for the convenience of the parties and witnesses, and in the interest of justice. Section 1404(b) allows for a transfer of a trial location only with the consent of all parties. Section 1404(c) allows the court to transfer the location of trial to "any place within the division in which the case is pending."

under 28 U.S.C. § 1404 in ordering the transfer of the location of all future trials to the Greenville Division.

3. The District Court Clearly Abused Its Discretion By Misapplying The Law To The Facts And Reached A Patently Erroneous Legal Conclusion Under § 1404(a).

Despite the lack of any statutory authority under 28 U.S.C. § 1404 for the transfer of the trials from the Western Division to the Greenville Division, the District Court relied exclusively on a § 1404(a) analysis in its January 29, 2009 Order in justifying its transfer of all future trials in this litigation from Oxford to Greenville. The District Court clearly abused its discretion in its application of § 1404(a). In order to meet the transfer requirements of 28 U.S.C. § 1404(a), the movant must satisfy "the statutory requirements and clearly demonstrate that a transfer is '[f]or the convenience of parties and witnesses, in the interest of justice.'" *Volkswagen*, 545 F.3d at 315. "[W]hen the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice should be respected," and the motion to transfer should be denied. (*Id.*)

a. The District Court Already Determined That The Interest Of Justice And The Convenience Of The Parties And Witnesses Require Trial To Be Held In The Western Division.

The District Court had initially concluded that the Western Division was the most convenient and appropriate location for trial. The court expressly held that the "convenience of the parties and witnesses (taking no account of the attorneys' convenience) and the interest of justice weigh heavily in favor [of trial in] the Western Division," particularly since Petitioners "filed in the Western Division and the vast majority of the witnesses and the parties reside, and the majority of the events giving rise to the action occurred, in the Western Division." (App. G.)

b. The District Court Considered Irrelevant And Prohibited Factors In Finding That The Greenville Division Was The Most Convenient Forum.

Despite this earlier express finding that the interest of justice and the convenience to the parties and witnesses weigh heavily in favor of the Western Division, the District Court nevertheless ordered that the trial be transferred from the Western Division. In conducting its new § 1404(a) analysis in its May 17, 2006 and July 25, 2006 Orders, the District Court erred by giving weight to factors that no court has ever cited as relevant to a § 1404(a) transfer,

including one factor (the convenience of the court) that has been unanimously rejected as irrelevant by numerous courts.[6]

For example, in support of its transfer of the trials to the Greenville Division, the District Court cited the alleged "burden" on: (a) itself in having to try cases 145 miles away from its "duty station"; (b) the taxpayers who have to pay the judge and his staff for mileage, meals and hotel accommodations; and (c) "the Greenville courthouse" resulting from its being without a district judge to attend to emergency or criminal matters while conducting trial in Oxford. In short, the essence of the District Court's reasoning for transferring the trials to the Greenville Division was that trials in Greenville will be more convenient for the District Court and its staff.

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[6] Equally important, the District Court relied on facts not relevant under controlling Fifth Circuit authority. In *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1336 (2009), the Fifth Circuit identified four private interest factors and four public interest factors "as appropriate for the determination of whether a § 1404(a) transfer is for the convenience of parties and witnesses and in the interest of justice." *Volkswagen*, 545 F.3d at 315. The private interest factors are: (1) the relative case of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. (*Id.*) The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of law or in the application of foreign law. (*Id.*)

However, no reported decision has ever suggested that such factors are relevant to the analysis of whether a transfer is appropriate under § 1404(a). In fact, "the law is well established that a federal court may not order transfer under section 1404(a) merely to serve its personal convenience." *In re Scott*, 709 F.2d 717, 721 (D.C. Cir. 1983). Moreover, there is no reported decision in which any court has held that, despite the fact that the convenience of the parties and witnesses weigh heavily in favor of one location, the trial may be transferred away from that location based on other factors such as the convenience of the court. The plain and unambiguous language of 28 U.S.C. § 1404(a), which focuses on the "convenience of the parties and witnesses," does not support a transfer under such circumstances.

The District Court also erred in concluding that the local interest in having localized interests decided at home weighs equally between the Greenville Division and the Western Division. This case involves allegations of personal injuries and/or property damage as a result of alleged negligent operations of a wood-treating plant in Grenada, Mississippi. Grenada is located in the Western Division. It is indisputable that the residents of Grenada have "extensive connections with the events that gave rise to this suit." *Volkswagen*, 545 F.3d at 318. On the other hand, the residents of the Greenville Division have no connection to the wood-treating plant located in Grenada, Mississippi, and thus no interest in the outcome of this litigation.

Moreover, no resident of Grenada will ever have the opportunity to sit on a jury in connection with this litigation if the location of all future trials is transferred to Greenville. In the Northern District of Mississippi, juries are selected depending on the division within the Northern District in which they live.[7] The residents of Grenada will be deprived of any opportunity to play a role in the resolution of this litigation which is a matter of great local interest. The District Court plainly erred in concluding the second public interest factor of having localized interests decided at home "weighs equally between Greenville and Oxford."

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[7] The Jury Plan for the Northern District of Mississippi requires the Clerk of Court to maintain a separate master jury wheel for each of the jury divisions of the Northern District. 1997 Amendment to Plan of the United States District Court for the Northern District of Mississippi, All Divisions, for the Random Selection of Grand and Petit Jurors, No. WM 73-28 (N.D. Miss. 1997), *available at* http://www.msnd.uscourts.gov/juror_plan.htm. Residents of Grenada County are included on the jury wheel for the Western Division. Residents of Grenada County are not included on the jury wheel for the Greenville Division. Rather, only residents of Bolivar, Coahoma, Carroll, Humphreys, Leflore, Sunflower and Washington counties are included on the jury wheel for the Greenville Division. Thus, there is no chance for any resident of Grenada County to be selected to sit on a jury empanelled to hear a case in Greenville, Mississippi.

4. The District Court Violated 28 U.S.C. § 104 In Ordering The Transfer Of All Future Trials To Greenville.

The District Court's transfer of all future trials to the Greenville Division is also inconsistent with 28 U.S.C. § 104 which provides the locations for a trial to be set within a specific division. Section 104(a)(2) directs that "[c]ourt for the western division shall be held at Oxford." Because this litigation is still pending in the Western Division, the mandatory language of § 104(a)(2) requires that all trials be held in Oxford, and any local practice that would afford to the District Court the discretion to transfer the location of trials for cases pending in the Western Division to the judge's "duty station" outside of the Western Division would be contrary to § 104(a)(2) and invalid. The alleged local practice would simply violate federal statutory law governing transfers.

5. The District Court Clearly Abused Its Discretion In Relying On An Unwritten And Unpublished Local Practice Of The Northern District In Ordering The Transfer Of All Future Trials To Greenville.

Last, the District Court clearly abused its discretion in relying on "the Northern District's unwritten practice of allowing the discretion to try any case assigned to a given judge at his or her duty station" and its "inherent discretion to control its docket" as an alternative basis for transferring the

location of all future trials to Greenville. There is no practice in the Northern District of Mississippi that complies with Federal Rules of Civil Procedure 83(a) and affords to the district judges the discretion to try any case at the judge's duty station.[8] Nowhere in the published Local Rules of the Northern and Southern Districts of Mississippi or the published Standing Orders and Internal Practices of the Northern District of Mississippi is there any Rule that provides to a district judge the "discretion" to try any case at the judge's "duty station." Rule 83 delineates a clear procedure that must be followed in order for the Northern District of Mississippi properly to adopt local practices, and this procedure plainly has not been followed with respect to this unwritten and unpublished local practice. For this reason alone, the District Court's reliance on this unwritten and unpublished practice as the authority supporting its transfer of the location of all future trials from the Western Division to the Greenville Division was clearly erroneous and amounts to a usurpation of the judicial power.

The unwritten and unpublished local practice relied upon by the District Court also does not comply

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[8] Federal Rule of Civil Procedure 83(a) provides the framework for a district court to adopt local rules governing its practice and requires that the practice be: (1) adopted by a majority of the district judges; (2) made available to the Bar for review and comment prior to adoption; and (3) published and made available to the public. In addition, the local practice must be consistent with Federal statutes.

with the statutory requirements of any of the three subsections of 28 U.S.C. § 1404 or with 28 U.S.C. § 104. As discussed above, § 1404 does not allow the District Court to transfer the location of the trial to a more inconvenient forum, to transfer the trial to another location without the consent of all parties, or to transfer the trial location to a location outside the division in which the case is pending. Moreover, § 104 requires that trials for cases pending in the Western Division be held in Oxford, Mississippi.

In short, there is no evidence that the Northern District of Mississippi has a valid rule or practice providing district judges the discretion to try any case assigned to the judge at his or her duty station. If such a practice did exist, it would violate both Federal Rule of Civil Procedure 83(a) and federal statutory law governing transfers, and it would be a clear abuse of discretion to follow such a practice.

CONCLUSION

Petitioners have presented no compelling reason why this Court should grant the Petition for a Writ of Certiorari. Petitioners have not shown that the Fifth Circuit Court of Appeals' order granting a writ of mandamus directing the District Court to conduct all future trials in this litigation in the Western Division of the Northern District of Mississippi involves a circuit split relating to some important matter, a conflict between the court of appeals and state courts

on an important federal question, an important federal question that should be settled in the first instance by this Court, or an important federal question that conflicts with a relevant decision of this Court. Moreover, the Fifth Circuit acted within its discretion and properly exercised its supervisory authority in issuing the writ of mandamus to prevent the District Court from acting erroneously and clearly abusing its discretion by conducting future trials in this litigation in the Greenville Division which has no connection to the parties, the witnesses or the facts of these cases. The *Will* decision does not compel a different result. Not only did Petitioners waive any arguments based on *Will* and their claim that the Fifth Circuit was required to issue a detailed opinion explaining its grant of the writ of mandamus, but the *Will* case simply does not have the broad applicability that Petitioners assert. Finally, the Fifth Circuit Court of Appeals properly granted the writ of mandamus directing the District Court to conduct all future trials in this litigation in the Western Division of the Northern District of Mississippi, the division in which Petitioners filed the actions, where the litigation is still pending, where the District Court already found was the most convenient forum for the parties and the witnesses, and where the interest of justice and where federal law require the trial to be held.

The Petition for a Writ of Certiorari should be denied.

Dated: February 8, 2010

Respectfully submitted,

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APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
WESTERN DIVISION

FRED BECK, ET AL	PLAINTIFFS
VS.	NO. 3:03CV60-P-D
KOPPERS INDUSTRIES, ET AL	DEFENDANTS

CASE MANAGEMENT PLAN
AND SCHEDULING ORDER

(Filed Nov. 17, 2004)

The following Case Management Plan, including the deadlines established herein, having been established with the participation of all parties, can be modified only by order of the court, and only upon a showing of good cause supported by affidavits, other evidentiary materials, or reference to portions of the record.

IT IS HEREBY **ORDERED**:

1. ***CASE TRACK***

This case is assigned to the complex track.

2. ***ALTERNATIVE DISPUTE RESOLUTION***

X A. Alternative dispute resolution techniques will be helpful and will be used in this case as follows:

Mediation possibly

__ B. Alternative dispute resolution techniques will not be helpful and will not be used.

3. ***CONSENT TO TRIAL BY MAGISTRATE JUDGE***

__ A. The parties consent to trial by the Magistrate Judge.

X B. The parties do not consent to trial by the Magistrate Judge.

4. ***DISCLOSURE***

X A. The initial disclosure requirements of the Plan have been fully complied with.

__ B. The following additional disclosure is needed and is ordered as follows:

_____

5. ***MOTIONS AND ISSUE BIFURCATION***

A. It having been determined that the early filing of the following motion(s) might significantly affect the scope of discovery or otherwise speed this matter along, it is ordered as follows:

_____

_____

B. The court determines that staged resolution, or bifurcation of the issues for trial consistent with Civil Rule 42(b)

X (1) will not assist in expediting this case.

_ (2) will assist in expediting this case. Accordingly, it is ordered as follows: ___

_____

_____

6. ***DISCOVERY PROVISIONS***

A. *DISCOVERY LIMITATIONS CONSISTENT WITH TRACK ASSIGNMENT*

Interrogatories and requests for production are hereby limited to thirty (30) succinct questions. Depositions are hereby limited to the parties and no more than five (5) fact witness depositions per party without prior approval of the court.

B. *ADDITIONAL DISCOVERY LIMITATIONS OR OTHER PROVISIONS*

X 1. There are no further discovery limitations or other provisions.

_ 2. The court finds that additional discovery limitations or other provisions should be imposed as follows:

_____

7. ***OTHER PROVISIONS***

None.

8. ***SCHEDULING DEADLINES***

The scheduling deadlines to be set out in this order are governed by the track designation and, to the extent not superseded by the Civil Expense and

Delay Reduction Plan adopted by this court, by Uniform Local Rule 6(d). Copies of Local Rule 6(d) and pertinent portions of the Plan are appended hereto.

SCHEDULING DEADLINES

1. On or before November 1, 2004, the plaintiffs will designate their twelve (12) trial plaintiffs;

2. On or before December 15, 2004, the defendants will take the depositions of those twelve (12) trial plaintiffs if they have not been deposed already.

3. On or before February 1, 2005, the plaintiffs will designate their experts along with presenting expert reports that will address general causation on the entire Beck case a well as specific causation and damages on the twelve (12) trial plaintiffs.

4. On or before April 1, 2005, the defendants will designate their experts and produce reports that will address general causation on the entire litigation as well as specific causation on the twelve (12) trial plaintiffs.

5. On or before June 1, 2005, the parties will file all motions, except motions in limine. Furthermore, the parties will complete all discovery on general causation, as well as the specific causation and damages of the twelve (12) trial plaintiffs.

6. Except the supplementation of depositions of experts addressing specific causation and damages as

to the additional trial plaintiffs, the parties will be allowed one expert deposition on general causation.

7. The plaintiffs' counsel will supply defendants with fully executed medical authorizations on the first twelve (12) trial plaintiffs so medicals can be obtained on the trial plaintiffs before depositions. The defendants will provide copies to plaintiffs of all medical records obtained.

8. This case is set for trial with the twelve (12) designated trial plaintiffs before U. S. District Judge W. Allen Pepper, in Greenville, Mississippi, on October 24, 2005, at 9:00 A.M.

9. This case is set for final pretrial conference with the twelve (12) designated trial plaintiffs, before the undersigned, in Aberdeen, Mississippi, at 1:30 P.M. on September 26, 2005.

THIS 17th day of November, 2004.

/s/ Jerry A. Davis
U. S. MAGISTRATE JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
WESTERN DIVISION

FRED BECK, ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:03CV60-P-D

KOPPERS INDUSTRIES INC., ET AL., DEFENDANTS.

ORDER

(Filed Mar. 16, 2005)

These matters come before the court upon Defendants' Motion to Return this Matter for Trial in the Western Division [161-1] and Plaintiff's Motion to Transfer for Trial Pursuant to 28 U.S.C. § 1404(b) [170-1]. Upon due consideration of the motions and the responses filed thereto the court finds as follows, to-wit:

This mass toxic tort case, which involves hundreds of plaintiffs, was originally filed in the Western Division of the Northern District of Mississippi. Thus trial was originally set to occur in Oxford, Mississippi which is located in the Western Division. The court in its Case Management Order of November 17, 2004 ordered that due to judicial budgetary restrictions, the trial must take place in the undersigned's courtroom in Greenville, Mississippi located in the Greenville Division of the Northern District of Mississippi. Perhaps to bolster the record to support the transfer,

the plaintiffs filed the instant motion under 28 U.S.C.A. § 1404(b) to try this case in Greenville. The defendants filed the instant motion to return trial of this matter to Oxford pursuant to § 1404(a).

In 1988 the divisional venue statute, 28 U.S.C. § 1393, which required *inter alia* that suits against a defendant must be brought in the division of the defendant's residence, was repealed. Pub. L. No. 100-702, Title X § 1001(a), 102 Stat. 4664.

28 U.S.C.A. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Subsection (b) states in pertinent part: "Upon motion, consent or stipulation of all parties, any action . . . of a civil nature . . . may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district."

Despite defendants' argument to the contrary, the court did not lack the authority to transfer trial from one division to another within the same district on its own motion. The court's November 17, 2004 Case Management Order transferred trial of the instant case from the Western Division to the Greenville Division citing budgetary restrictions. This action falls under the rubric of § 1404(a)'s "in the interest of justice" language. Moreover, the transfer did not run afoul of subsection (a)'s language allowing transfer to any "other . . . division where it might have been

brought" since, given the repeal of divisional venue and the lack of a local rule to the contrary, a plaintiff can freely file a federal lawsuit in any division within the Northern District of Mississippi.[1] Although subsection (b) requires a motion, consent or stipulation of all parties, nothing in subsection (a) prevents the court from transferring a case on its own motion.

Thus, it appears that under § 1404(a) a district court may transfer non-removal cases among divisions within its district with or without consent and with or without a motion. In doing so, however, the court must look to the convenience of the parties and witnesses and the interest of justice.

This leaves the disposition of the two instant motions. The plaintiffs move under § 1404(b) to transfer their case from the Western Division in which they originally filed to the Greenville Division. As stated above, subsection (b) does not contain language regarding the convenience of the parties and witnesses but rather leaves such transfers to the discretion of the district court. After considering the plaintiffs' motion, the court concludes that such a transfer should be denied – especially since they filed in the Western Division and the vast majority of witnesses and parties reside, and the majority of the

---

[1] In cases of removal, however, a case filed in a given state court must be removed to the same district *and* division embracing that state court. 28 U.S.C.A. § 1441(a).

events giving rise to this action occurred, in the Western Division.

For the same reasons that the plaintiffs' motion to transfer divisions should be denied, the defendants' motion to transfer divisions under § 1404(a) should be granted. In the present circumstances, the convenience of the parties and witnesses (taking no account of the attorneys' convenience) and the interest of justice weigh heavily in favor of transfer to the Western Division.

IT IS THEREFORE ORDERED AND ADJUDGED that:

(1) Defendants' Motion to Return this Matter for Trial in the Western Division [161-1] is hereby **GRANTED**;

(2) Plaintiff's Motion to Transfer for Trial Pursuant to 28 U.S.C. § 1404(b) [170-1] is **DENIED**; and

(3) Trial of this matter shall be **CONTINUED AND TRANSFERRED** until 9:00 a.m. on Monday, October 31, 2005 at the U.S. Courthouse in Oxford, Mississippi.

SO ORDERED this 15th day of March, A.D., 2005.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX H

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF MISSISSIPPI
WESTERN DIVISION**

FRED BECK; ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:03CV60-P-D

**KOPPERS INC., f/k/a
KOPPERS INDUSTRIES, INC.; DEFENDANTS.**

CONSOLIDATED WITH

HOPE ELLIS, ET AL., PLAINTIFFS,

VS. CIVIL ACTION NO. 3:04CV60-P-D

**KOPPERS INC., f/k/a
KOPPERS INDUSTRIES, INC.; DEFENDANTS.
ET AL.,**

ORDER

(Filed Jan. 29, 2009)

This matter comes before the court upon Defendants Koppers Inc. and Beazer East, Inc.'s Motion to Reconsider Orders of May 17, 2006 and July 25, 2006 and Set Trial in Oxford, or, in the Alternative, for Interlocutory Appeal [1149] and Defendant Illinois Central Railroad Company's Joinder therein [1150]. After due consideration of the motion and the responses filed thereto, the court finds as follows, to-wit:

Originally 110 plaintiffs filed the instant action on March 20, 2003 in the Western Division of the Northern District of Mississippi. On March 15, 2005, the court entered an Order granting the defendants' motion to transfer trial to Oxford and denying the plaintiffs' motion to transfer to the Greenville Division. Approximately a month later the court entered an Order on April 14, 2005 severing 98 of the original 110 plaintiffs and set separate trials of the remaining 12 plaintiffs.

Beginning in mid-April 2006 the court held the trial of the first plaintiff of 12 which lasted for approximately three weeks. On May 17, 2006 the court granted the plaintiff's *ore tenus* motion to conduct the remaining 11 trials in Greenville. In that Order, the court noted that its March 15, 2005 Order granting the defendants' motion to transfer trial to Oxford was entered before the severance of 98 plaintiffs and the setting of 12 separate trials and that after experiencing the three-week trial in Oxford away from the undersigned's duty station in Greenville, the court concluded that it was in the interests of justice to conduct the future trials in Greenville.

The defendants filed a motion for a writ of mandamus to the Fifth Circuit Court of Appeals asking the Court to require this court to hold the future trials in Oxford. That writ was denied without comment.

The defendants also filed an appeal of the jury verdict in favor of Kenesha Barnes. Ultimately, the Fifth Circuit reversed and rendered the jury verdict on November 6, 2008 based on a conclusion that the applicable statute of limitations period had run. Though the defendants argued their position that the trials should be conducted in Oxford to the Court of Appeals for the second time, the Court rendered its decision without ruling on the defendants' appeal of this court's May 17, 2006 Order transferring the future trials to Greenville. In its November 6, 2008 Opinion, however, the Court of Appeals characterized the court's transfer of the remaining trials to Greenville as "unprecedented."

During a November 25, 2008 status conference in chambers to determine which of the remaining plaintiffs' claims were affected by the Court of Appeals' statute of limitations ruling, the defendants reiterated their argument that the remaining trials should be held in Oxford. Though the plaintiffs countered that the Court of Appeals declined to directly rule on the transfer issue, the court suggested that the defendants should file a motion to transfer and for an interlocutory appeal.

On December 31, 2008 the defendants filed a motion to reconsider the court's May 17, 2006 Order granting the plaintiff's *ore tenus* motion to transfer future trials to Greenville and its July 25, 2006 Order denying the defendants' first motion to reconsider that order.

Having considered the background of this case and its prior orders, the court concludes that it has the authority to hold the future trials in Greenville and that the defendants' second motion to reconsider the court's May 17, 2006 Order should be denied.

For the sake of convenience, the court will repeat its reasoning.

Pursuant to 28 U.S.C. § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district **or division** where it might have been brought." (emphasis added).

Title 28 U.S.C. § 1393, the divisional venue statute, was repealed in 1988 as part of the Judicial Improvements and Access to Justice Act. *See* Wright & Miller, 14D Fed. Prac. & Proc. Juris.3d § 3809 ("[T]here is no longer any requirement in federal civil cases that venue be laid in a particular division within a district" given the repeal of 28 U.S.C. § 1393). Therefore, this action could have been brought in the Greenville Division of the Northern District of Mississippi.

Moreover, the Fifth Circuit has held that "[a] intradistrict transfer is not required absent a strong showing of prejudice." *U.S. v. Duncan*, 919 F.2d 981, 985 (5th Cir. 1990). Therefore, there is current precedent supporting this court's decision to deny the defendants' motion to transfer in question.

Furthermore, though § 1404(a)'s language "the convenience of parties and witnesses, in the interest of justice" might suggest otherwise, "it is well established that the interest of justice is a factor to be considered on its own and an important one and that the interest of justice may be decisive in ruling on a transfer motion. . . ." Wright & Miller, 15 Fed. Prac. & Proc.2d § 3854 (citing *e.g., Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 222 (7th Cir. 1986) ("The 'interest of justice' analysis relates, then, to the efficient functioning of the courts, not to the underlying dispute.").

As stated in its May 17, 2006 Order, there are several reasons why the interests of justice weigh in favor of conducting the remaining trials in the Greenville Division.

First, the court would have been far more reluctant to grant the defendants' Motion to Return this Matter for Trial in Western Division on March 15, 2005 had it known the case would be separated into twelve separate trials. Furthermore, since the court's original transfer order on March 15, 2006, the court consolidated the case of *Ellis, et al. vs. Koppers, Inc. et al.*, Cause Number 3:04cv160 with the instant case, thereby adding 948 additional plaintiffs. It is highly burdensome and inefficient for the court to try twelve (possibly more) 3-to-6-week trials 145 miles away from its duty station.

Second, given there is only a 25 mile difference between Grenada (the location of the subject facility

and many of the plaintiffs) and Oxford compared to the distance between Grenada and Greenville, trying twelve 3-to-6-week trials in Oxford poses an unreasonable burden on the taxpayers who have to pay the undersigned and his law clerks, secretary, courtroom deputy, and court reporter thousands of dollars for mileage, meals, and hotel accommodations. The Clerk of Court for the Northern District has determined these costs amounted to $10,132.92. Thus, if all twelve trials are tried in Oxford, the tax payers will be burdened with a probable amount of over $120,000.00. That cost will increase exponentially if some or all of the approximately 948 claims are tried from the *Ellis v. Koppers* case that have been consolidated with the instant case.

Third, since the instant motion does not involve transfer of venue from one district to another but rather from one division to another (and keeping in mind there is no divisional venue statute), the only practical difference between trying the case in Greenville or Oxford is the jury pool given that in either event the parties will retain the same judge. The court concludes that the most probable reason the defendants have been so adamant about trying the cases in Oxford is to avoid a Greenville jury. The defendants have proffered no evidence or even argument as to why a Greenville jury will unduly prejudice them, much less any clear and convincing evidence that there is any difference between the quality of a jury in Greenville as opposed to one in Oxford. *See In re Horseshoe Entertainment*, 305 F.3d

354, 358 (5th Cir. 2002) (possibility of prejudice, such as larger verdicts, in one district or another must be established by clear and convincing evidence; vague and indefinite circumstances will not suffice). Since the plaintiffs moved for the transfer, the court concludes that the plaintiffs do not object to a Greenville jury.

Fourth, it is unduly burdensome on the Greenville courthouse to be without a district judge for twelve 3-to-6-week periods 145 miles away since there would be no district judge to attend to emergency or criminal matters that inevitably arise in the course of the court's business.

Fifth, in terms of convenience of witnesses, the plaintiffs have not argued that their witnesses will be unduly burdened. Furthermore, the defendants only put on one witness in the Barnes case – Dr. James Thigpen – who is from Jackson. It is approximately 40 miles closer to Greenville from Jackson than it is to Oxford.

The defendants insist that this court does not have the authority to hold the remaining trials in the Greenville Division because (1) Title 28 U.S.C. § 104 states that "Court for the western division shall be held in Oxford"; and (2) the court's stated practice in the Northern District of Mississippi that "allow[s] a court the discretion to try any case assigned to a given judge at his duty station" is not approved by law.

Though it is true that 28 U.S.C. § 104(a)(2) states that "Court for the western division shall be held at Oxford," there is no procedural mechanism to enforce that technical requirement given the repeal of the divisional venue statute. Furthermore, if the court were to strictly comply with §104, it would be unable to hold trials for the Delta Division since § 104(3) requires that court for the Delta Division shall be held at Clarksdale or Cleveland and there is no federal courthouse in Clarksdale or Cleveland. The practice of the Northern District of Mississippi – albeit an unwritten one – is to split up the cases in the Delta Division among the Greenville Division and the Western Division. Another anachronism contained in § 104 is that Eastern Division cases shall be held in Aberdeen, Ackerman, and Corinth when court is no longer held in the latter two cities.

As to the argument that the Northern District's unwritten practice of allowing the discretion to try any case assigned to a given judge at his or her duty station is not specifically approved by law, the Northern District of Mississippi is invested, as are presumably all federal courts, with at least a modicum of inherent discretion to control its docket as long as the exercise of that discretion does not run contrary to law. As stated above, given the absence of a divisional venue statute, the subject practice does not run contrary to law.

After consultation with the other District and Magistrate Judges in the Northern District of Mississippi, it is the opinion of the undersigned and

the consensus of the Judges of this Court that the defendants' interpretation of the law on the matter of intra-district transfer of trial location is not only legally incorrect, it also fails to take into account the nature of how civil cases and the trials thereof are divided in this district, which is designed to avoid "judge shopping." According to the Northern District of Mississippi Order of December 3, 2007, the allocation of cases are as follows:

Judge	Eastern Div.	Delta Div.	Western Div.	Greenville Div.
Chief Judge Mills	20%	30%	50%	25%
Judge Pepper	5%	50%	15%	50%
Judge Aycock	50%	10%	15%	25%
Sr. Judge Biggers	10%	10%	10%	0%
Sr. Judge Davidson	15%	0%	10%	0%

Thus, if they were required to hold civil trials in the division in which the case was filed, the District Judges in the Northern District would have to travel with their staffs a great deal of the time. Accordingly, Chief Judge Mills would have to travel for 45% of civil cases,[1] the undersigned for 20% of civil cases, Judge Aycock for 40%, Sr. Judge Biggers for 10%, and Sr. Judge Davidson for 10%. Such travel would cause undue and unnecessary burdens on the court and the taxpayers. For example, the two courtrooms in Greenville are more readily available since there is only one

[1] There is no courthouse or District Judge assigned to the Delta Division.

resident District Judge and one resident Magistrate Judge. In Oxford and Aberdeen, on the other hand, there are two resident District Judges and one resident Magistrate Judge each. Thus, for the undersigned to schedule eleven or more separate trials in the instant case in the Western Division would require obtaining a courtroom for three to four weeks at a time in an already crowded docket in Oxford despite the fact that the courtroom in Greenville is readily available.

Another burden upon the court posed by the defendants' proposition involves the number of courtrooms in each of the courthouses. The courthouse in Oxford has three courtrooms, while the courthouses in Aberdeen and Greenville each have two courtrooms. In the event the District Judges in the Northern District of Mississippi were required to travel for all of their civil cases, it is probable that there would be instances in which one or more traveling District Judge would need to use a given courtroom in another courthouse which would lead to inevitable scheduling conflicts. For example, if two traveling District Judges both had trials scheduled in Aberdeen at or near the same time, and the resident District Judge and Magistrate Judge also needed their courtrooms, there would be three District Judges and one Magistrate Judge competing for two courtrooms.

Given the relatively recent *en banc* decision in *In re Volkswagen of America, Inc.*, 545 F.3d 304 (5th Cir. 2008), involving transfer of venue, the court

believes it prudent to distinguish the circumstances in this case from those in the *Volkswagen* case. First and foremost, the *Volkswagen* case involved a motion to transfer from one Texas district to another Texas district. The instant case, however, involves an *intra*-district transfer – *i.e.*, a transfer of trial from one division to another division within the same district. This is an important distinction because, as discussed above, there is no divisional venue statute. Furthermore, unlike the situation in *Volkswagen* where the original division and district had no connection whatsoever to the parties, witnesses, or facts of the case, the situation in this case involves the same judge and a different division for trial that is a mere 25 miles further from the town wherein the alleged torts occurred than in the original division. Another distinguishing factor from the *Volkwagen* case is that the defendants in that case moved for transfer while it is the plaintiffs in this case that moved for transfer. Accordingly, this court concludes that the underlying circumstances and holdings of *Volkswagen* are inapplicable to the instant case.

Even if the *Volkswagen* case were applicable to the matter at hand, the court concludes that the factors discussed by the Court of Appeals weigh in favor of holding trial in Greenville. The Fifth Circuit cited a number of private and public interest factors for courts to use in determining whether transfer from one district to another under § 1404(a) is appropriate:

> The private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law."

In re Volkswagen, 545 F.3d at 315.

The first three private interest factors weigh equally between Greenville and Oxford. As stated above, it is only approximately 25 miles farther to Greenville from Grenada (the location of the subject facility and the neighborhood) than to Oxford. There is no difference in the ease of access to sources of proof. Compulsory process is available to secure compulsory process in both cities. The cost of attendance for willing witnesses would be the same, if not cheaper in Greenville since accommodations are more readily available than in Oxford and the cost of living in Greenville is less than in Oxford. However, the fourth private factor – all other practical problems that make trial of a case easy, expeditious and inexpensive – weighs heavily in favor of Greenville for the reasons discussed above.

As to the public interest factors, the first factor – the administrative difficulties flowing from court congestion – have already been established to weigh in favor of Greenville. The second factor – the local interest in having localized interests decided at home – weighs equally between Greenville and Oxford since Grenada is relatively equidistant between the two cities. The third factor – the familiarity of the forum with the law that will govern the case – also weighs equally since trial in either city will be presided over by the same judge. The fourth factor regarding conflict of laws is inapplicable.

Though it concludes that the defendants' motion to reconsider its ruling requiring the remaining trials to be held in Greenville should be denied, the court agrees that the defendants' alternative motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292 should be granted. Though this court believes that the ground for difference of opinion is just barely substantial enough to warrant certification, an immediate appeal from the May 15, 2006 and July 25, 2006 Orders would materially advance the ultimate termination of this litigation since a ruling from the Court of Appeals could prevent this court from being required to try the next of the remaining trials twice.

IT IS THEREFORE ORDERED AND ADJUDGED that:

(1) Defendants Koppers Inc. and Beazer East, Inc.'s Motion to Reconsider Orders of May 17, 2006 and July 25, 2006 and Set Trial in Oxford, or, in the

Alternative, for Interlocutory Appeal [1149] and Defendant Illinois Central Railroad Company's Joinder therein [1150] is **GRANTED** insofar as it seeks certification of the propriety of an interlocutory appeal; however,

(2) The motion is **DENIED** insofar as it seeks to transfer the remaining trials in this matter to Oxford, Mississippi.

SO ORDERED this the 29th day of January, A.D., 2009.

/s/ W. Allen Pepper, Jr.
W. ALLEN PEPPER, JR.
UNITED STATES
DISTRICT JUDGE

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 09-5

KAY HOBBS; WALTER HOBBS; DAVID HILL; ALICE HILL; CARLUS LOGGINS; ET AL; HOPE ADAMS ELLIS, Individually and as next friend and guardian of the minor child; ELEKIA ADAMS; BALDWIN ANDRÉ ELLIS; SUSAN LONG ALEXANDER; KATHLEEN LESTER LONG,

Plaintiffs-Respondents

versus

KOPPERS INC, formerly known as Koppers Industries Inc; BEAZER EAST INC; ILLINOIS CENTRAL RAILROAD CO,

Defendants-Petitioners

Motion for Leave to Appeal
from an Interlocutory Order

(Filed Apr. 3, 2009)

Before KING, DENNIS, and OWEN Circuit Judges.

PER CURIAM:

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District

Court for the Northern District of Mississippi at Oxford, entered on January 29, 2009, is [Denied].

IT IS FURTHER ORDERED that petitioners' motion to have the same panel assigned that heard case number 06-60708 is [Denied].

/s/ [CDK] [JLD] [PRO]